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In the Supreme Court of the United States

OCTOBER TERM, 1988

BENJAMIN R. WARD, ET AL., PETITIONERS

v.

ROCK AGAINST RACISM, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the First Amendment requires municipal officials who, as a means of controlling noise in a public park, compel sponsors of concerts at a park Bandshell to use a publicly-provided sound system and technician to demonstrate that this requirement is the least restrictive means available to achieve their noise-control objective.

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INTEREST OF THE UNITED STATES

This case presents important questions concerning the constitutionality of efforts by governmental officials to regulate the use of sound amplification equipment in public parks. The National Park Service is charged with promoting and regulating the use of the national parks, 16 U.S.C. 1. Each year it issues permits for over a thousand performances, demonstrations, and other special events in the National Capital area alone. The Secretary of the Interior has

issued regulations governing demonstrations and other events in the Capital-area parks, one of which addresses the use of various kinds of sound enhancement equipment. That regulation authorizes the Regional Director of the Park Service to limit the use of such equipment so that it "will not unreasonably disturb nonparticipating persons" in the parks (36 C.F.R. 7.96(g)(5)(xii)(B)). The United States therefore has a strong interest in the legal standards applying to this type of regulation.

STATEMENT

1. Petitioners are the City of New York and several of its officials with responsibility for overseeing the administration of its parks. In January 1986, the City hired petitioner Joseph Killian to be the program director for the Naumburg Acoustic Bandshell in Central Park. The Bandshell is an outdoor amphitheatre, surrounded by grassy areas and trees. To its west lies Sheep Meadow and ultimately residential apartments on the West Side of New York (Pet. App. 38-39). One of Killian's first responsibilities was to draft guidelines governing the numerous events that take place at the Bandshell each year (*id.* at 28-29).

When he drafted the guidelines, Killian was aware of complaints that sound from Bandshell events was "bleed[ing]" out beyond the concertground (C.A. App. 278-279). He considered several alternative solutions to this problem, including negotiating with concert sponsors concerning decibel levels or providing a city technician to operate the sponsors' sound equipment (*id.* at 287). He concluded, however, that

a single decibel level would be unworkable because of differences in foliage and other conditions at particular concerts and that city technicians would not perform adequately using unfamiliar equipment (*id.* at 287-288). Accordingly, the guideline adopted provides that the Parks Department will be the sole provider of sound amplification. The Department contracts for this service with a private company, New York Sound (Pet. App. 36).[1]

Respondent, Rock Against Racism, is an unincorporated association "which describes itself as 'dedicated to the espousal and promotion of anti-racist views'" (Pet. App. 24). Since 1979, respondent has sponsored an annual "musical/political event," including music and speeches, at the Bandshell (*id.* at 25). Respondent first filed suit against the City prior to its 1985 concert, seeking injunctive relief against what it viewed as interference by the City. The dispute was settled as to that year's performance (*id.* at 26). After the City promulgated its guidelines in 1986, respondent reactivated its suit and obtained a preliminary injunction permitting it to use its own sound system at its 1986 event.[2] Following the 1986 concert, respondent amended its complaint to seek

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[1] The guidelines also addressed such other issues as permits, hours and dates of use, fees, and liability insurance, among others. A number of these guidelines were challenged in the district court, and it declared some of them unconstitutional (Pet. App. 54-55, 58-76). Because the City did not take an appeal with respect to those guidelines, their validity is not before the Court.

[2] The district court opinion granting the preliminary injunction is reported at 636 F. Supp 178 (S.D.N.Y. 1986).

a declaratory judgment "striking" the City's guidelines, as well as compensatory and punitive damages (*id.* at 26-27).

2. After discovery, the district court heard five days of oral testimony, and on April 6, 1987, issued its Memorandum Opinion and Order (Pet. App. 23-81). The district court held that the sound amplification guideline was constitutional (*id.* at 36-49).

The court found that the City had made diligent efforts to select a quality sound system for the Bandshell—retaining a consultant and stressing quality, not price, in its choice (Pet. App. 39-40). It also found that sponsors of a wide variety of events, running "the full cultural gamut from grand opera to salsa to reggae," had used the system and were uniformly pleased with the quality of its sound (*id.* at 41). The district court found that "[t]he City's practice for events at the Bandshell is to give the sponsor autonomy with respect to sound mix, *i.e.*, balancing treble with bass, highlighting a particular instrument or voice, and the like. The New York Sound engineer does all that he can to accommodate the sponsor's desires in those regards" (*id.* at 42).[3]

The engineer supplied by the City retains control over the volume of the sound at each concert (Pet. App. 42-43). However, the district court found that when a question of excessive sound arises, Killian makes it a practice to confer with the sponsor before taking corrective action (*id.* at 43). The City attempts to keep the sound sufficiently loud to reach listeners within the concertground, but not so loud

[3] In denying a post-trial motion, the district court ruled that there was no evidence that the technician supplied by the City was unable in any way to implement the instructions of the sponsors. Pet. App. 89.

that it will extend unnecessarily into adjoining areas of the park, where people may be pursuing other forms of recreation (*ibid.*).

The district court characterized Central Park as a "public forum" for purposes of the First Amendment (Pet. App. 32), but concluded that the City had a legitimate governmental interest in controlling excessive noise there (*id.* at 44). While the court "accept[ed] that [respondent] has a First Amendment right to the use of a sound amplification system capable of producing the quality of sound it desires, and the level of sound necessary to reach throughout the audience area" (*id.* at 46), it characterized respondent's interest in using its own system and technician, on the evidence before it, as attenuated at best (*id.* at 47). Noting that the record limited respondent to a challenge to the sound amplification guideline on its face, the court held that the guideline was constitutional because it did not "impinge upon a protected right" and "was narrowly tailored to further a legitimate governmental interest" (*id.* at 48).

3. The court of appeals reversed. The court acknowledged that the City has the power "to regulate expressive conduct which has harmful effects upon others" (Pet. App. 10), and stated that "[c]ontent neutral time, place and manner regulations are permissible so long as they are narrowly tailored to serve a substantial government interest and do not unreasonably limit alternative avenues of expression" (*id.* at 11). However, citing *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968), the court also stated that "the method and extent of such regulation must be reasonable, that is, it must be the least intrusive upon the freedom of expression as is reasonably nec-

essary to achieve a legitimate purpose of the regulation" (Pet. App. 12).

Applying these standards, the court of appeals adverted to several alternative methods of controlling volume (Pet. App. 18),[4] and concluded that the City had not demonstrated that requiring sponsors to use the sound system and engineer provided by New York Sound "was the least intrusive means of regulating volume" available (*id.* at 20). The court described a sponsor's choice of a sound system and its operation as "an element of the artistic performance" that is "protected as a means of artistic expression" (*ibid.*). The City, the court concluded, had not shown "a justification for intrusion upon that right of expression, nor [had] the city shown that such intrusion is reasonably necessary to control the volume" (*ibid.*). The court of appeals held that the City's guideline was a violation of respondent's First Amendment rights to the extent that it required use of a publicly-provided sound system and technician (*id.* at 22).

SUMMARY OF ARGUMENT

The City's sound amplification guideline is a restriction on the manner in which performers at the Bandshell may communicate with their audiences. As such, it is subject to standards, set forth in a number of this Court's decisions, which require that

[4] The court stated that the City could permissibly limit the decibels of a performance or the power of a sponsor's equipment (Pet. App. 13-14). The panel also raised as possibilities allowing the sponsor's technician to operate the sound mixing board subject to a city technician's control over volume or perhaps by means of a device "to limit sound output" (*id.* at 18-19). As a last resort, the court said, the City could "pull the plug" on an recalcitrant sponsor (*id.* at 21 n.6).

time, place and manner restrictions on First Amendment activity be justified without reference to the content of the regulated speech, be narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for the expression involved.

The straightforward application of these standards to the district court's findings of fact compels the conclusion that the sound amplification guideline is constitutional. The guideline is content-neutral. All performers in the Bandshell are required to use the sound system supplied by the City and are given complete artistic autonomy in all respects except volume. Preventing excessive noise is a legitimate state interest. The means selected to further that interest —choosing a high-quality sound system, requiring all performers to use it, and honoring their artistic preferences as to sound mix—is narrowly tailored to further that interest. Finally, performers at the Bandshell have not been deprived of ample channels to deliver their message. The City's engineer is capable of implementing performers' musical preferences and, during the 1986 season, everyone except respondent—who did not actually use the system—expressed satisfaction with the quality of the amplified sound. The City should have to prove nothing further to justify its sound amplification guideline as a reasonable time, place, or manner restriction.

The "least restrictive alternative" approach followed by the court below cannot be reconciled with this Court's decisions, and the court of appeals' reliance on *United States* v. *O'Brien*, 391 U.S. 367 (1968), was misplaced. In *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 298 & n.8 299 (1984), this Court explained that *O'Brien* em-

bodies essentially the same standards as the Court's time, place and manner decisions, and described itself as unmoved by an argument that there were less restrictive alternatives to a challenged regulation. The Court has since reiterated that a regulation is not unconstitutional "simply because there is some imaginable alternative that might be less burdensome on speech." *United States* v. *Albertini*, 472 U.S. 675, 689 (1985).

The court of appeals' least restrictive alternative approach is completely unworkable in the context of public parks. Judgments concerning whether particular regulations are advisable must depend, in the first instance, on expert assessments of the relative importance of competing uses of the parks and the best means of allocating scarce park resources among those uses. In this context, judicial review looking to whether a less intrusive alternative to a particular regulation can be imagined would substitute the judiciary for duly selected park officials on an important issue of park management.

The problems that the approach of the court below would present to managers of our National Parks —especially those in the National Capital area—are particularly acute. The events that take place annually in Capital-area parks run the gamut from Fourth of July celebrations on the Mall, to marches on Washington, to folk festivals, to hundreds of smaller demonstrations and assemblies. The Park Service must rely on a variety of techniques for regulating sound in all of these settings. The First Amendment does not and cannot require it to satisfy a court that it has selected the least restrictive of all possible alternative means of preventing excessive noise for each of the events that takes place in a national park.

Indeed, we believe that such a requirement would actually impair the very First Amendment values it purports to serve. It would necessitate microscopic judicial analysis of the elements of First Amendment activity in each individual case and equally detailed attempts at accommodating them. The result would be to call into question reasonable conditions for use of the parks that are applied evenhandedly to all points of view. By contrast, the Court's traditional approach to time, place and manner restrictions demands official neutrality, effective and focused regulation, and ample channels for communication of all messages. That framework structures the judgments of park officials and courts, and defines their respective roles, in a manner which more effectively accommodates the constitutional, public and governmental interests at stake.

ARGUMENT

I. NEW YORK CITY'S SOUND AMPLICATION GUIDELINE IS A CONSTITUTIONAL RESTRICTION ON THE MANNER IN WHICH BANDSHELL PERFORMERS MAY REACH THEIR AUDIENCES

Both lower courts assumed, and it is apparently not disputed by the parties, that the Bandshell is a "public forum" for purposes of First Amendment analysis. See, *e.g.*, *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983); *Hague* v. *C.I.O.*, 307 U.S. 496, 515-516 (1939). In such a forum, the government's power to prohibit First Amendment activity is limited. However, the state may impose reasonable limitations on the time, place, and manner of speech. The standards for such regulations are now well-established. Such regulations are valid (*Clark*, 468 U.S. at 293):

provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.[5]

In our view, the straightforward application of these standards to the district court's detailed findings of fact compel the conclusion that the City's sound amplification guideline regulation is constitutional.

A. The Guideline Is Justified Without Reference to Content

The City's guideline is content-neutral. Because its principal purpose is to assure the effectiveness of the City's efforts to prevent excessive noise in its park, it is "justified without reference to the content of the regulated speech" (468 U.S. at 293). See *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986). The application of the sound amplification guideline is not at all "dependent * * * on the nature of the message being conveyed" (*Carey* v. *Brown*, 477 U.S. 455, 461 (1980)), nor does the guideline permit the City "to discriminate on the basis of the content of the message" that any performer wishes to convey (*Regan* v. *Time, Inc.*, 468 U.S. 641, 648 (1984)).

On the district court's findings, the sound amplification guideline is scrupulously evenhanded. The

[5] Accord, e.g., *Frisby* v. *Schultz*, No. 87-168 (June 27, 1988), slip op. 6, 9; *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986); *City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 812 (1984); *United States* v. *Grace*, 461 U.S. 171, 177 (1983); *Perry Local Educators' Ass'n*, 460 U.S. at 45-46; *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-648 (1981).

City requires all performers to use its sound system and technician, but gives them complete autonomy with respect to all issues of sound mix. The City retains control only over volume, which it exercises so that the sound from an event will "reach all listeners within the defined concertground" (Pet. App. 43). The guideline thus affords "all points of view an equal opportunity to be heard." *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 96 (1972). And it is "not open to the kind of arbitrary application that this Court has condemned as inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view." *Heffron*, 452 U.S. at 649.[6]

B. The Guideline Is Narrowly Tailored To Serve A Significant Governmental Interest

Both lower courts agreed that the City's desire to control noise in the park—the guideline's principal objective—was a legitimate state interest (Pet. App. 12, 44). This Court's decisions compel that conclusion. *Grayned* v. *City of Rockford*, 408 U.S. 104, 116 (1972); *Kovacs* v. *Cooper*, 336 U.S. 77 (1949). See *Saia* v. *New York*, 334 U.S. 558, 562 (1948); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 387 (1969). "If overamplified loudspeakers assault the

[6] The court of appeals rejected respondent's contention that the sound amplification guideline was unconstitutional because it allows discrimination along points of view in terms of volume (Pet. App. 14-15). The court explained that the regulation was constitutional on its face, since it implies that the sound will be loud enough for each particular audience to hear, but not so loud as to oblige others to listen (*ibid.*). There was no showing that the City had discriminated, in terms of volume, in applying the sound amplification guideline (*ibid.*).

citizenry, government may turn them down." *Grayned*, 408 U.S. at 116.

In *Clark*, this Court suggested that the relation between a regulation's end and its means is sufficiently narrow if the means is "focused" on the permissible objective and is effective in furthering it (468 U.S. at 296-298). The City's guideline passes muster on both counts.[7] The guideline focuses specifically on the City's substantial interest in preventing excessive noise in Central Park, and furthers that objective by putting control over volume in the hands of a City-employed engineer. Thus, while it preserves the sponsor's autonomy on issues of sound mix, the guideline "responds precisely to the substantive problem which legitimately concerns" the City (*City Council* v. *Taxpayers for Vincent*, 466 U.S. at 810), and "targets * * * no more than the exact source of the 'evil' it seeks to remedy" (*Frisby* v. *Schultz*, No. 87-168 (June 27, 1988), slip op. 10).

The guideline also has the degree of effectiveness prescribed by the Court's cases. A time, place and manner regulation need not be perfectly tailored (*Clark*, 468 U.S. at 296-297), but it must promote "a substantial government interest that would be achieved less effectively absent the regulation" (*United States* v. *Albertini*, 472 U.S. 675, 689 (1985)).[8] This

[7] The district court held that the sound amplification guideline was "narrowly tailored" to serve this objective (Pet. App. 47, 48). Its detailed findings of fact fully support that conclusion.

[8] Accord *Clark*, 468 U.S. at 297 ("If the Government has a legitimate interest in ensuring that the National Parks are adequately protected, which we think it has, and if the parks would be more exposed to harm without the sleeping prohibition than with it, the ban is safe from invalidation under the First Amendment as a reasonable regulation of the manner in which a demonstration may be carried out.").

degree of effectiveness is self-evident from the guideline itself, and has been confirmed by the City's actual experience. The district court found that the City's earlier, less direct, attempts to control volume had been unsuccessful. "[P]rior efforts on the part of the Parks Department's representatives to reduce [respondent's] sound levels [had] been non-availing and confrontational" (Pet. App. 47). No greater showing of effectiveness is necessary under *Clark*. The judgment of how a chosen level of noise is to be attained is for City officials, not a court (468 U.S. at 299).

C. The Guideline Leaves An Ample Channel Of Communication For Bandshell Performances

On its face, the sound amplification guideline does not significantly narrow the channel of communication between performers and audiences at the Bandshell. The City does not interfere with performers on the stage at all. It endeavors to maintain the volume at a level that, in view of the conditions present at each individual event, permits all members of the audience to hear (Pet. App. 14). The engineer supplied by the City "does all he can to accommodate the sponsor's desires" on artistic issues (*id.* at 42). The district court specifically found, in denying respondent's post-trial motion, that the City's engineer is "able properly to implement a sponsor's instructions as to sound quality or mix" (*id.* at 89). The City took pains to choose a quality sound system (*id.* at 39-40). And all performers who actually used the system during the 1986 season were "uniformly pleased" (*id.* at 41). By comparison with any of the Court's time, place and manner decisions, any inter-

ference with the relevant First Amendment channel of communication is minimal.[9]

The fact that sponsors are not permitted to select and operate the sound system for their performances, even though these actions are "an element of the artistic performance" and "thus are protected as a means of artistic expression" (Pet. App. 20), suggests no different conclusion. "Reasonable time, place, or manner restrictions are valid even though they directly limit oral or written expression." *Clark*, 468 U.S. at 298 n.8. The Court's cases require that a time, place, or manner restriction preserve a channel of communication that is "ample," not unaffected. "[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron*, 452 U.S. at 647. The district court's findings of fact justify its characterization of a sponsor's interest in the selection and operation of a sound system as "attenuated at best" for purposes of the First Amendment (Pet. App. 47).[10]

Moreover, the Court's cases foreclose a narrow definition of the relevant channel of communication for purposes of analyzing a time, place, or manner restriction. It is virtually always possible to isolate

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[9] See, *e.g.*, *Frisby*, slip op. 9; *Clark*, 468 U.S. at 295; *City of Renton*, 475 U.S. at 53-54; *Heffron*, 452 U.S. at 654-655.

[10] Since the City technician follows a sponsor's preferences on artistic matters and is capable of implementing them, these artistic elements have not been shown to affect what the audience hears at all. Thus, the First Amendment interest burdened by the sound amplification guideline is limited to whatever intrinsic value there is in selecting the system and operating the controls. That interest is relatively small in terms of First Amendment values.

one element of First Amendment expression which bears the brunt of a time, place, and manner regulation and to characterize the regulation as a complete ban on that expressive element. Here, for instance, it could be said that the City's sound amplification guideline prohibits outright those aspects of artistic expression which are inherent in the selection and direct control of the Bandshell's sound system. However, if a regulation were invalid simply because it foreclosed some aspect of expression, virtually every time, place or manner regulation would be unconstitutional. Far from accepting such an approach, this Court has consistently viewed the protected "channel" of comunication broadly, and has examined the adequacy of the opportunities remaining for expression.

In *Heffron* v. *International Society for Kirshna Consciousness*, *supra*, for example, the members of the Society were required to sell their religious literature from a booth at a state fair, and were not allowed to wander around the fairground to engage in that activity. The Society claimed that the rule was "a total ban on protected First Amendment activities in open areas of the fairgrounds" (452 U.S. at 655 n.16). The Court rejected this characterization, stating that it "is inaccurate to say that [the rule] constitutes a ban on such protected activity in the relevant public forum" (*ibid.*). Similarly, in *Clark*, it would have been just as possible to describe the Park Service's rule as a "total ban" on symbolic sleeping, which the Court assumed was protected activity. However, the Court framed the relevant issue as whether "the plight of the homeless could * * * be communicated in other ways." 468 U.S. at 295. From the proper perspective, in short, the sound am-

plification guideline preserves an "ample" channel of communication.

D. *United States* v. *O'Brien* Does Not Support The Court of Appeals' Least Restrictive Alternative Test

The court of appeals found support for its least restrictive alternative test in *United States* v. *O'Brien*, *supra*.[11] However, the Court's subsequent cases have made clear that *O'Brien* does not impose more stringent limitations on content-neutral regulations than the Court's time, place and manner decisions. In *Clark*, the Court described the "four-factor standard" of *O'Brien* as "in the last analysis * * * little, if any, different from the standard applied to time, place, or manner restrictions" (468 U.S. at 298; accord *id.* at 308 n.6 (Marshall, J., dissenting)). The Court explained that if "the time, place or manner restriction on expressive sleeping * * * sufficiently and narrowly serves a substantial enough governmental interest to escape First Amendment condemnation, it is untenable to invalidate it under *O'Brien* on the ground that the governmental interest is insufficient to warrant the intrusion on First Amendment concerns or that there is an inadequate nexus between the regulation and the interest sought to be served." *Id.* at 298 n.8.[12]

[11] In *O'Brien*, the Court held that an individual's conviction for burning his draft card did not violate his First Amendment rights. It stated that a regulation that applies to conduct that combines "speech" and "non-speech" elements is justified (391 U.S. at 377):

> if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Further, in *Clark*, the Court specifically refused to read *O'Brien* as imposing a least restrictive alternative test on time, place, or manner restrictions. The Court described itself as "unmoved by the * * * view that the challenged regulation is unnecessary, and hence invalid, because there are less speech-restrictive alternatives that could have satisfied the Government interest in preserving park lands" (468 U.S. at 299). And it added that various alternatives that the D.C. Circuit had proposed as arguably less restrictive of First Amendment speech "represent[ed] no more than a disagreement with the Park Service over how much protection" the parks require and how that level of protection was to be attained. The Court stated that neither *O'Brien* nor its time, place or manner decisions "assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks." 468 U.S. at 299. Similarly, in *Albertini*, 472 U.S. at 689, the Court reiterated that time, place, and manner regulations are not invalid "simply because there is some imaginable alternative that might be less burdensome

[12] Accord *Albertini*, 472 U.S. at 689 ("[A]n incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."). See also *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (classifying *O'Brien* as a time, place, and manner case); *City Council* v. *Taxpayers for Vincent*, 466 U.S. at 804-805, 808-810 (using elements of both tests in a single case).

on speech." See *Regan* v. *Time, Inc.*, 468 U.S. at 657 (opinion of White, J.) ("The less-restrictive-alternative analysis * * * has never been a part of the inquiry into the validity of a time, place, and manner regulation. It is enough that the * * * regulation substantially serves the Government's legitimate ends.").[13]

II. A LEAST RESTRICTIVE ALTERNATIVE REQUIREMENT WOULD BE COMPLETELY UNWORKABLE AS APPLIED TO LIMITATIONS ON EXPRESSION TAKING PLACE ON PUBLIC PARK LANDS

There are insuperable objections to the application of a least restrictive alternative requirement in the context of public lands that are managed with the competing interests of many users in mind. Any such

[13] In some early decisions from which the Court's time, place and manner standards evolved, less restrictive alternatives were invoked to demonstrate graphically that the challenged statutes were not focused on the evils they were allegedly enacted to eliminate. For instance, in *Schneider* v. *State*, 308 U.S. 147 (1939), the Court held that a municipality could not constitutionally ban handbilling as a way of controlling litter. In the Court's more recent cases, this type of defect has been more precisely stated in terms of a statute's failure to "focus on" or "target" an evil accurately. See *Frisby*, slip op. 10; page 12, *supra*. Indeed, in *City Council* v. *Taxpayers for Vincent*, 466 U.S. at 809-810, the Court distinguished the ban on posted signs in issue in that case from *Schneider*'s prohibition on handbilling by pointing out that it was the signs themselves that caused the urban clutter that the ban was enacted to eliminate. However stated, the basic requirement is that a time, place and manner regulation must be focused on the evil it seeks to alleviate. None of the Court's cases suggest that a court is justified in questioning state or local officials' choice from among means that are reasonably directed at a permissible purpose.

requirement is inadministrable even in its own terms. Moreover, it necessarily involves courts in determining not only "how much protection of park lands is wise and how that level of conservation is to be attained" (*Clark*, 468 U.S. at 299), but how best to balance a broad range of other individual and group interests. Under the guise of determining whether park managers have chosen the means of furthering permissible goals that provides the *optimal* balance between those goals and free expression, courts unavoidably intrude on policy judgments about the priority to be given to various competing uses of park lands. Further, expressive activity typically consists of a number of elements viewed from two perspectives, the speaker's and the audience's, and it is therefore not even possible in many cases to classify a particular regulation affecting expression as more or less restrictive than others.

This case illustrates that point. The court of appeals suggested that the City would have been on stronger ground if it had left the sound equipment in the sponsors' hands but reserved the right to "pull the plug," characterizing that approach as a "reasonable alternative to a restriction on the expressive rights of sponsors" (Pet. App. 21 n.6). The district court reached the opposite conclusion, saying that "[d]irecting a New York Sound Company technician to turn down the sound * * * is less intrusive than pulling the plug" (*id.* at 47-48). There is no correct answer in this debate. The difference is one of perspective. The court of appeals focused on the "expressive rights of sponsors" while the district court emphasized the interests of the performers and the audience in having the performance heard at all. It is virtually impossible, we submit, for a park

manager to show that any alternative regulation is the least restrictive of each individual element of First Amendment activity to which that regulation may be applied.[14]

A least restrictive alternative analysis is particularly unworkable when applied to the National Park system. By comparison to that system, the setting for this case. a single bandshell in Central Park, is a narrow one. The Park Service issues approximately 1500 permits each year for demonstrations and other events in the National Capital area alone. These permits often allow the use of sound enhancement equipment but, like New York's sound amplification guideline, limit the volume to that necessary to reach the relevant audience. The applicable regulation provides in pertinent part (36 C.F.R. 7.96(g)(5)(xii)):

> Sound amplification equipment is allowed in connection with permitted demonstrations or special events, provided prior notice has been given to the Regional Director [of the Park Service], except that * * *
>
> (B) The Regional Director reserves the right to limit the sound amplification equipment so that it will not unreasonably disturb nonparticipating persons in, or in the vicinity of, the area.

[14] The court of appeals' reasoning enabled it to skirt these difficulties, since it invalidated the City's sound enhancement guideline without identifying a particular means through which the City could control the volume under varying conditions at Bandshell events so that the sound would reach, but not overshoot, the particular audience. The court offered some possibilities, but it expressly declined to rule on their constitutionality (Pet. App. 18). Rather, it placed the burden of disproving the adequacy of all other alternatives on the City (*id.* at 19, 21).

This basic standard is applied to an enormous range of activities.[15] There are concerts and folk festivals on the Mall, demonstrations ranging from hundreds of thousands of people to a handful, and a variety of other events at many locations throughout the parks. In implementing its regulation, the Park Service relies on a number of alternatives, reflecting its experience with thousands of events over the years. Ironically, these do not include the method chosen by New York City, supplying and operating a sound system, but have included others that were alluded to in this case. Generally, Park Service officers monitor the sound level at the perimeter of a demonstration or event and attempt to resolve any question of excessive noise with the promoters of an event. Often events are located so that there is access to electrical outlets installed by the government. In those cases, an officer may be stationed near the control panel to insist, when necessary, that the volume be kept at an appropriate level. In other cases, sponsors provide their own generators, but the Park Service retains the right to instruct those in control to moderate the output of their equipment. As a last resort, the Park Service reserves the right to turn off the power when the volume is not kept to a reasonable level. The range of events that the Park Service licenses justifies the range of alternative means of regulating volume that it employs.

[15] The Park Service's basic standard is well understood by the public. See American Civil Liberties Union Fund of the National Capital Area, *Demonstrating in the District of Columbia* 12 (1982) ("Except at the White House sidewalk, sound equipment may be used. It should only be loud enough to clearly be heard at the edge of the audience.").

The First Amendment simply cannot require the Park Service to isolate a single, hard-to-identify least restrictive alternative for each of the events it supervises. New York City and the Park Service have chosen different methods for regulating excessive noise in their respective parks. But the Constitution does not require the City to abandon its choice in favor of an arrangement favored by the Park Service any more than it requires the Park Service to determine whether it would be less intrusive—as the district court suggested—to supply sound equipment for the many events that occur each year in National Capital Parks.

Even from the standpoint of First Amendment values, the approach to time, place, and manner limitations embodied in *Clark* and other opinions of this Court is a far more meaningful and reasonable limitation on the management prerogatives of park managers than the court of appeals' least restrictive alternative analysis. The criteria applied in *Clark* focus judicial review on aspects of a challenged regulation that are most relevant to First Amendment values and thus provide fundamental protection for First Amendment expression. The requirement that a time, place, and manner restriction be content-neutral guarantees official evenhandedness. It assures that the government cannot place unpopular points of view at a relative disadvantage, thereby also assuring that they will receive any benefits extended to potentially more popular speakers. In this case, for instance, the fact that all groups would have to abide by the same sound amplification guideline and use the same sound system was a significant assurance, to all performers, that the guideline would be fair and the system of good quality. The Court's

now well-established time, place, and manner standards also guard against misguided restrictions on speech. The requirement that a regulation be closely-tailored to a legitimate interest protects First Amendment activity from ineffective or unjustified regulations. And the requirement that government preserve "ample alternative channels for communication" sets a floor that protects First Amendment activity even from regulations that serve a legitimate purpose.

These criteria also favor broadly-justified regulations that feature equal access to park facilities for all points of view. When conscientious park officials consider relaxing or restricting a park's use, the *Clark* criteria encourage them to consider the anticipated effects on the entire pertinent category of park users, and to put aside individualized (and potentially discriminatory) concerns. This approach is not just permissible (see 468 U.S. at 297), but preferable from the standpoint of both First Amendment and other legitimate public concerns. It discourages discrimination and unjustified suppression of speech, while preserving for park managers the choices of "how much protection of park lands is wise," "how that level of conservation is to be attained" (*Clark*, 468 U.S. at 299), and how competing park users will be accommodated.

The least restrictive alternative analysis, by contrast, encourages a court to take the particular regulation in dispute as a starting point and to hypothesize marginally less intrusive means of managing the parks. "A judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation * * *." *Illinois Elections Board* v. *Socialist*

Workers Party, 440 U.S. 173, 188-189 (1979) (Blackmun, J., concurring). This approach diverts attention from the basic issue of a regulation's impact on the constitutionally-relevant channel of communication to such questions as whether, in this case, the City had disproved the technological feasibility of "a volume limiting device" that would have permitted it to regulate volume without operating the mixing board at the Bandshell (Pet. App. 18).

This kind of analysis not only invariably involves courts in the kinds of judgments that should be made by those who are experienced in park management, but also places park managers at the mercy of imaginative efforts to hypothesize marginally "less restrictive" solutions to the problems they face. That approach also tends to favor microscopic attention to First Amendment interests and hand-tailored accommodations that both trivialize First Amendment values and undercut sound park management. In our view, First Amendment values, as well as the interests of the public and the government in the parks, are better served in the long run by broad guarantees of official neutrality and ample channels for First Amendment expression than by case-by-case judicial review of claims that park managers could have selected a marginally better means of preserving the parks or allocating park resources among competing uses.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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